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281-910—67

In the Supreme Court of the United States

OCTOBER TERM, 1967

No. 608

LARRY KNOHL, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1–A28) is reported at 379 F. 2d 427.

JURISDICTION

The judgment of the court of appeals (Pet. App. A29) was entered on June 22, 1967. A petition for rehearing (Pet. App. A30) was denied on July 17, 1967. By order of Mr. Justice Fortas (Pet. App. A31), the time for filing a petition for a writ of certiorari was extended to and including September 15, 1967. The petition for a writ of certiorari was filed on September 13, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court properly ruled that petitioner was able to stand trial.

2. Whether tape recordings, including a copy of a lost tape, of conversations between petitioner and a witness, originally made by the witness upon her own initiative, were properly admitted in evidence to corroborate oral testimony that petitioner endeavored to obstruct the due administration of justice.

3. Whether the government was required to make such recordings available to petitioner in advance of trial in the absence of an appropriate motion under Rule 16(a), F. R. Crim. P.

4. Whether the admission of such recordings in evidence violated petitioner's rights under the Fourth and Fifth Amendments.

STATEMENT

After a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted of unlawfully endeavoring to influence a witness under grand jury subpoena, in violation of 18 U.S.C. 1503. He was sentenced to imprisonment for a period of five years (1 R. 5, 116–117). The court of appeals affirmed.

1. *Testimony tending to show petitioner's endeavor to suborn perjury.*

In August 1965, petitioner asked Mrs. Fuller, with whom he had been dealing on another matter, to negotiate, for a commission, some $100,000 in Treasury bills, payable to bearer. He stated that he could not do this himself, as the government had a $7,000,000 tax

lien against him. He suggested that she obtain a loan on them from her bank, telling the officers that the bills had been given to her by Cyril O'Neil, a Cleveland industrialist, now dead, with whom her former employer had had business dealings (1 R. 122). Using this approach, Mrs. Fuller negotiated six bills at two banks (1 R. 123–127, 130–137, 356–357). Mrs. Fuller transferred the funds to petitioner through a small New York establishment which discounted the checks and gave the proceeds to petitioner without keeping any records of his involvement (1 R. 126, 246–248, 363–373).

On August 19, officers of the Bankers Trust Company of New York found that six $100,000 Treasury bills among a group deposited by a client were missing. They bore the serial numbers of those negotiated by Mrs. Fuller (1 R. 346–359). On August 24, while Mrs. Fuller was in the Barclay Bank for the purpose of withdrawing $10,000 at petitioner's request, an F.B.I. agent and bank officials told her that the Treasury bills which she had negotiated had been stolen from Bankers Trust Company (1 R. 139–142). Shortly thereafter petitioner told Mrs. Fuller to keep to the O'Neil story, that nothing would happen since dead men tell no tales. At petitioner's instruction, Mrs. Fuller consulted Brodsky, an attorney (1 R. 141–143).

On the following day, August 25, Mrs. Fuller was subpoenaed to appear before the grand jury. Petitioner came to her apartment and again told her to keep to the O'Neil story. At a later conference in Mrs. Fuller's apartment, with Brodsky present, petitioner advised Mrs. Fuller not to change her story of how

she came into possession of the bills (1 R. 144–145). The attorney corroborated this account, testifying that petitioner went over with Mrs. Fuller the testimony she was to give before the grand jury the next day as to how she came into possession of the securities and how she came to know O'Neil (1 R. 327–330).[1]

2. *Electronic recordings corroborating testimony.*

On August 12, 1965, Mrs. Fuller, who had learned something about tape recording in the Army Signal Corps and who "like[d] to play with electronics," purchased a recorder to tape her conversations with petitioner. Her initial recordings were not successful (1 R. 146–148, 184–189, 196–197, 284), but she did obtain recordings of conversations on August 24, 25 and 26 (1 R. 159, 166, 203), using a tape which was capable of recording for a period of four hours. She cut off the tape at the end of the August 24 recording and again at the end of the August 25 recording (1 R. 269–278).

On September 10, on her own initiative, Mrs. Fuller took the August 25 tape to F.B.I. agent Goss. Although Mrs. Fuller was unwilling to surrender the tape to Goss, she did permit him to copy the tape by playing it into the microphone of a second recording machine. She also agreed to have the original tape placed in a safe deposit box at Bankers Trust, retaining both keys but promising not to withdraw the tape without F.B.I. approval (1 R. 190–192). Mrs. Fuller

[1] Both Mrs. Fuller and the attorney testified that the attorney conferred privately with petitioner in an adjoining room and then told Mrs. Fuller that he could not represent her, advising her only to tell the truth before the grand jury (1 R. 145, 331).

subsequently produced recordings of a number of other conversations she had had with petitioner. She testified that all the tapes were complete and untampered with except for one brief passage containing an objectionable personal remark, which had nothing to do with the Treasury bills and which she eliminated by taping her voice over that brief section (1 R. 160–161, 198–200, 266, 268, 291).

The method of re-recording used on September 10 was unsatisfactory because the microphone of the second machine picked up not only the original recording, but additional background noises (1 R. 300–301). A few days later, Goss called Mrs. Fuller and asked her to bring in the tape from the vault, so that he could try to make a copy with better equipment. The attempt to do so was unsuccessful. Mrs. Fuller took the tape, but instead of returning it to the bank, took it to her apartment and placed it in a drawer (1 R. 289, 301). In February or March 1966, upon the advice of the attorney who was then representing her, she took all the tapes of her conversations with petitioner to the F.B.I. In playing them over, it was discovered that the tape that Mrs. Fuller thought contained the August 25 conversation was blank (1 R. 193, 204, 285, 301, 315–316).

A re-recording of the copy which the F.B.I. had in its possession was made in order to filter out background noise. Agen Goss testified that, in the course of the re-recording, both of the original and the first copy, there was no tampering with the tape, and that

the copy was accurate (1 R. 302–306).[2] Mrs. Fuller testified that nothing had been deleted from the original conversations on any of the tapes except the personal remark (*supra*, p. 5). Brodsky testified that, to the best of his recollection, nothing had been added to the August 25 tape and that only a very small percentage of words on the tape were indistinguishable (1 R. 342–343). This second copy and the originals of the August 24 and 25 conversations were, over objection, played to the jury (1 R .231–232, 374–378).

3. *Petitioner's efforts to obtain a continuance.*

Petitioner had a stroke on November 12, 1965. On March 5, 1966, a Dr. Brock, who had been appointed to examine petitioner in connection with an unrelated proceeding in the Eastern District of New York, reported that petitioner was then unable to withstand a trial of several months and should be reexamined in six months (R. 56–59).[3]

On May 9, 1966, petitioner moved for postponement of the trial in this case. Counsel agreed that Dr. Brock should again examine petitioner and report as to his ability to stand trial (1 R. 6–8). After examining petitioner and noting the opinion of petitioner's two doctors, Dolger and Frieden, that a trial would

[2] There was also testimony as to the accuracy of typewritten transcripts of the various conversations (1 R. 151, 203, 303, 320–321, 332). However, the transcripts were not introduced in evidence because of doubts expressed by the court as to their admissibility (1 R. 233–234, 362).

[3] As a result of the stroke, petitioner suffered partial paralysis of the right side and was confined to a wheel chair. There was slurring of speech, although petitioner was able to use words correctly. Petitioner was well oriented, alert and responsive. His behavior was for the most part normal, except for occasional over-emotional episodes.

be hazardous to petitioner's health, Dr. Brock gave it as his opinion that petitioner was able to stand trial. He suggested that a nurse or doctor be present as a precautionary measure. Dr. Brock also reported that petitioner was alert, responsive and cogent in conversation, and that there were signs that petitioner exaggerated his disabilities, claiming symptoms which were "not of organic pattern or origin" (1 R. 64–69).[4]

On June 3, 1966, the case was assigned for trial, with leave to the trial judge to hold a hearing on the question of petitioner's health if he thought it appropriate to do so. (1 R. 30–35). On June 14, Dr. Brock reported to the court that he and Dr. Dolger had made a further examination of petitioner. Dr. Brock adhered to his earlier opinion that petitioner was able to stand trial without dangerous consequences, but he joined with Dr. Dolger in suggesting that an expert in cardiovascular diseases and hypertension make an examination and give his opinion (1 R. 76, 79–81). A Doctor Clark was appointed to conduct the examination (2 R. 19).

Before Dr. Clark's report was received, petitioner's counsel filed on June 28 a lengthy affidavit seeking a continuance. The attorney asserted his own inability to try the case in the summer. He alleged that petitioner was physically unable to stand trial and mentally unable to assist counsel. There were submitted the doctors' reports and letters referred to above, and

[4] In an affidavit submitted in support of a motion for discovery, petitioner stated that his memory and thinking had been impaired by the stroke and medication (1 R. 27–29).

ten letters from various doctors, stating that a trial would be dangerous to petitioner's life, but not discussing any claim of mental incapacity (1 R. 42–83).

Dr. Clark filed an extensive report dated June 29. He concluded that, although any profound emotional experience involved some risk to petitioner's health, it was not an extreme risk, that petitioner's state of health did not preclude his standing trial, and that petitioner was as well then as he was likely to be (1 R. 84–95). Judge Herlands, having heard counsel on June 27 and June 29 (2 R. 11–26), and having conferred with Dr. Clark by telephone, overruled petitioner's application for a continuance in a memorandum decision dated June 30. He placed the case on the trial calendar for July 5, but noted that the trial judge would have discretion to decide whether or not there should be a hearing of medical witnesses (1 R. 96).

On July 5, before Judge Tyler, petitioner's counsel again sought a continuance on grounds of his own health and petitioner's inability to stand trial. The court assigned the case for trial before Judge Murphy (1 R. 100). The request for a continuance was renewed before Judge Murphy supported by a letter of Dr. Myers stating his opinion that a trial would endanger petitioner's life. The doctor said that petitioner's "mental and physical condition makes proper consultation with his counsel in the preparation of his case extremely difficult and very likely fruitless. He [is] a seriously deteriorated individual and the nature of his illness is such that there is little likelihood of future improvement" (1 R. 114–115). In argu-

ment before Judge Murphy, counsel said that he had not been able to consult with petitioner "more than a few times" (1 R. 105). He stressed petitioner's physical difficulties (1 R. 106). He said that the judge "ought to hear the medical testimony" although the doctor who had been treating petitioner was not in the country (1 R. 112). The judge said he would assume that Dr. Myers would testify in accordance with his report but he thought that "there has been enough medical testimony so far" (1 R. 112). Counsel said that he would try to produce Dr. Myers personally on the following day (1 R. 112). Dr. Meyers was not, however, offered as a witness. Trial was commenced on July 6, occupied six trial days and concluded on July 18 (1 R. 3).

ARGUMENT

1. Petitioner's repeated applications for a postponement of the trial from July to September were predicated on the assertion that a trial in July would endanger his health and life. While that assertion was supported by two physicians (Drs. Dolger and Frieden), it was denied by two court-appointed specialists (Drs. Clark and Brock) who reported that there was no inordinate peril in proceeding to trial and that petitioner was as well as he was ever likely to be. It was in this context that four district court judges denied the requested continuance (see 1 R. 96). Up to July 5, 1966—the very date set for trial—none of the medical opinions submitted by petitioner advanced the theory, now relied on, that petitioner's condition precluded adequate consultation with counsel. The submission of a letter from Dr. Myers (1 R. 114) to that effect on July 5 came at a time when, in the

usual course, the work of trial preparation would have been largely completed. Dr. Myers' letter was couched, as the court of appeals noted, in wholly conclusory terms (Pet. App. A13–A14), and in this regard differed markedly from the reports of detailed medical examinations previously received by the court. Then, too, this last minute effort to secure a continuance was in large measure based on an asserted lack of preparation and inability to proceed attributed to counsel's own ill health—a ground on which petitioner no longer relies.[5] Under these circumstances the court of appeals properly concluded that the district court had not abused its discretion in declining to hold an evidentiary hearing on the question of petitioner's mental and physical capacity to stand trial and assist counsel. Moreover, the court of appeals noted that petitioner makes no showing that his defense was in any way prejudiced by the state of his health and the trial

[5] In argument before District Judge Murphy on July 5, 1966, defendant's counsel stated:

"Now I am in this position, first, as you know, I have suffered two heart attacks * * *.

* * * * *

* * * If I have to work now I am afraid of what it will do to my health. I have not been able to prepare the case with this unbearable heat these last four or five days. It is completely impossible.

* * * * *

And I am not ready. I don't know what to tell you. That is the worst part of it, that I am not prepared, nor am I a well enough person to go on with it.

* * * * *

I say out of sympathy and mercy to me alone, let me try it in September."

[1 R. 105–107]

record reveals nothing from which such prejudice might be inferred (Pet. App. A17–A18).

2. The government introduced in evidence a copy of a tape recording (Exhibit 48) of a conversation between Mrs. Fuller and petitioner which took place at Mrs. Fuller's home on August 25, 1965. In the course of that conversation petitioner urged Mrs. Fuller to testify falsely before a grand jury. Petitioner urges that the receipt in evidence of Exhibit 48 violated the best evidence rule since it was a copy of the tape originally made by Mrs. Fuller.

Although, strictly speaking, the best evidence rule is addressed to writings (*Meyers* v. *United States,* 171 F. 2d 800, 812 (C.A.D.C.), certiorari denied, 336 U.S. 912), we do not doubt that electronic recordings may logically fall within the reason of the rule. Nonetheless, the rule requires that the original writing be produced "unless it is shown to be unavailable for some reason other than the serious fault of the proponent." McCormick, *Evidence* § 196 (1954). Here, the record clearly showed that the original of which Exhibit 48 was a copy had been lost by Mrs. Fuller and hence could not be produced. See p. 5, *supra.* Since the original was unobtainable, a copy was admissible under the exception to the rule. *United States* v. *Manton,* 107 F. 2d 834 (C.A. 2), certiorari denied, 309 U.S. 664.

Petitioner seeks to escape this difficulty by attempting to portray the conduct of the government in the handling of the original tape brought in by Mrs. Fuller as so grossly negligent, or indeed fraudulent, as to require the exclusion of the copy which was made. The record does not support this view. In the first place,

the government had no right to seize this tape when it was brought in to the F.B.I. office on September 10. The tape was Mrs. Fuller's property. The government inspected and copied it with her permission and properly returned it to her on her insistence. The arrangement made for placing the original tape in a safe deposit box was purely a matter of grace on the part of Mrs. Fuller. It is regrettable that she did not replace it in the vault after bringing it to the F.B.I. office the second time. There is however nothing to indicate that she wanted to destroy it. There would be no motive on her part for its destruction since a copy was in the possession of the F.B.I. In any event, she was not acting as agent for the government in her handling of her own tape. There was manifestly no motive for its destruction by the government, which had been at pains to preserve the tape as prime evidence. Moreover, nothing is suggested as to any possible change or omission in the copy which affected the tenor of the conversation made available to the jury. The attorney chosen by petitioner to represent Mrs. Fuller testified that the copy was an accurate record of the conversation (*supra*, p. 6).[6]

[6] *United States* v. *Consolidated Laundries*, 291 F. 2d 563 (C.A. 2), an antitrust case relied upon by petitioner, presented a distinctly different factual situation. There the government subpoenaed certain papers and then lost them during the course of the trial, but later found them. The court of appeals found that the lost evidence would have been helpful to defendant at trial for purposes of cross-examination and that the government had been negligent in letting the evidence get temporarily out of hand. Acting upon considerations of fairness, but without reaching any supposed constitutional issue, the court ordered a new trial. Here the same court has carefully reviewed the

The fact that a further copy was made to be played to the jury, from which high and low frequencies were filtered so as to minimize background noise, has no significance. *Monroe* v. *United States,* 234 F. 2d 49, 56 (C.A.D.C.), certiorari denied, 352 U.S. 873; *Cape* v. *United States,* 283 F. 2d 430 (C.A. 9). Petitioner and his counsel heard all the recordings (1 R. 230) and reported no discrepancies. Under the careful instructions of the court (1 R. 413–414), Exhibit 48 was properly in evidence for the purpose of corroborating the testimony of the witnesses who testified to the conversation of August 25.

3. Present Rule 16, F. R. Crim. P., provides that "Upon motion of a defendant the court may order the attorney for the government to permit the defendant to inspect and copy or photograph any relevant (1) written or recorded statements or confessions made by the defendant * * *." Petitioner's contention that this rule imposed an affirmative duty upon the government to come forward and produce the tapes in advance of trial is belied by the language of the Rule, which expressly requires a motion.

It is also apparent on the record that petitioner suffered no prejudice by not having the tapes before trial. Mrs. Fuller testified to their existence on the first day of trial, Wednesday, July 6, 1966. Court was not in session on Friday, July 8, and petitioner and his counsel heard all the tapes on that day (1 R. 230). The tapes were not received in evidence and played

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circumstances, found no prejudice and nothing more than excusable neglect in failing to supervise Mrs. Fuller's return of the tape to the strong box. We submit that there is no occasion for further review of this factual finding.

for the jury until Wednesday, July 13. At no time was there a request that any of them be examined by an expert. Nor was there any request for time to explore any leads suggested by the tapes. No suggestion has since been made of any exculpatory facts which could have been discovered through leads from tapes. The claim of prejudice is without foundation.

4. Finally, petitioner contends that his rights under the Fourth and Fifth Amendments were violated when Mrs. Fuller recorded incriminating conversations with him in her own home and turned the recordings over to the government. Even if it were assumed, contrary to all the evidence, that Mrs. Fuller was acting as an agent for the government, this argument is without merit in light of this Court's decisions in *Hoffa* v. *United States,* 385 U.S. 293; *Osborn* v. *United States,* 385 U.S. 323; *Lewis* v. *United States,* 385 U.S. 206; and *Lopez* v. *United States,* 373 U.S. 427. Petitioner does not show that he was subject to any kind of compulsion. He does not show that there was any trespass or intrusion into a constitutionally protected area. Quite unlike *Berger* v. *New York,* 388 U.S. 41, this is not a case of surreptitious eavesdropping. Petitioner intended Mrs. Fuller to hear him when he urged her to give false testimony before the grand jury. Clearly nothing in the Constitution required the exclusion either of her testimony as to his statements or of the recording that she made of them.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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